Post Hearing Brief Indication that F005, D008, and K087
Wastes were disposed

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)	
	)	Docket No. RCRA-V-W-86-45
Gary Development Company, Inc.	)	
	)	Judge Greene
Respondent	)	

POST-HEARING BRIEF OF COMPLAINANT
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Complainant United States Environmental Protection Agency, Region V submits this brief to summarize the hearing that took place in this matter on September 9, 10 and 11, 1987 and December 17 and 18, 1990.

I. INTRODUCTION

On May 30, 1986, Region V filed a Complaint and Compliance Order against Respondent Gary Development Company, Inc. ("GDC") pursuant to its authority under Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, ("RCRA"). The complaint alleged that GDC was operating a hazardous waste landfill at 479 North Cline Avenue, Gary, Indiana (the "facility") without the interim operating status or permit required by RCRA and that GDC violated numerous state regulations[1] governing the operation of hazardous waste

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[1] On August 18, 1982, the State of Indiana was granted interim authorization to administer a hazardous waste management program in lieu of the federal program. 47 Fed. Reg. 357,970. This authorization became final on January 31, 1986. 51 Fed. Reg. 3,953. As resolved in this Court's ruling on GDC's motion to dismiss, U.S. EPA retains the authority to enforce State regulations in authorized States.

landfills. Region V ordered GDC to submit a closure plan for the facility to the Indiana Department of Environmental Management ("IDEM") for approval, to submit a groundwater quality assessment program plan and implementation schedule to Region V and IDEM for approval, to implement the closure and groundwater quality assessment program as approved, to submit the results of the groundwater quality assessment to Region V and IDEM, to post "Danger" signs at the facility in accordance with state regulations and to no longer accept hazardous waste. Region V also assessed a civil penalty of $117,000 against GDC pursuant to the May 8, 1984 Final RCRA Civil Penalty Policy.

A hearing was held in this matter on September 9, 10 and 11, 1987 and December 17 and 18, 1990.

On September 9, 1987, U.S. EPA stipulated to the withdrawal of allegations in the complaint relating to EPA Hazardous Waste No. F006, which had been exempted from regulation under RCRA during the time accepted for disposal by GDC by a U.S. EPA Headquarters temporary de-listing decision. On that same date, GDC moved to dismiss the matter, claiming that Region V could not bring an enforcement action in the State of Indiana, which is authorized to implement the federal RCRA program, and that previous agreements with the State barred the federal action pursuant to the doctrines of collateral estoppel and res judicata. The court denied GDC's motion in an opinion and order dated September 29, 1989.

II. REGION V HAS PROVED, AND GDC HAS FAILED TO REBUT, THE VIOLATIONS ALLEGED IN THE COMPLAINT

Region V has met the burden of proof established in 40 C.F.R. § 22.24 by establishing that the violations set forth in the complaint occurred.[2] GDC has failed to go forward with any adequate defense to the allegations in the complaint, but relies on the inaccurate assertion that it did not accept hazardous waste at its facility and, accordingly, is not subject to regulation under RCRA.

A. GDC owns and operates a hazardous waste management facility

The foundation for Region V's allegations and the central issue at controversy in this matter is the GDC facility's status under RCRA. Through the testimony of Ted Warner, IDEM inspector, Jonathan Cooper, Region V hydrologist, and Larry Hagen, GDC president, and the introduction of documentary evidence, Region V has proved that GDC accepted EPA Hazardous Wastes Nos. F005, D008 and K087 for disposal at the facility. Acceptance of such waste subjects the GDC facility to the RCRA requirements set forth in the complaint.

F005. Mr. Cooper testified that, pursuant to its authority under § 3007 of RCRA, Region V requested information from American Chemical Service, Inc. ("ACS") regarding possible shipments of hazardous waste to the GDC facility. He further

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[2] As noted above, Region V has withdrawn allegations that GDC improperly disposed of F006; how withdrawal of these allegations does not substantially affect the outcome of this matter is explained later in this brief.

testified that, in response to this information request, ACS submitted an annual report and shipping manifests indicating that ACS shipped approximately 396 tons of EPA Hazardous Waste No. F005 to the GDC facility between December 1980 and November 1981. [Hearing transcript, pages 301, et seq.]. ACS's response to the information request, dated October 24, 1988, was admitted into evidence as Complainant's Exhibit 22. [Hearing transcript, page 310]. The ACS response includes a statement by James Tarpo, ACS president, certifying that the information contained therein is true, accurate and complete. Each of the manifests included in the ACS response classifies the waste taken to GDC as EPA Hazardous Waste No. F005 (paint sludge) and is certified by an ACS representative as properly classifying the manifested materials according to applicable U.S. EPA regulations. The ACS response indicates that ACS received hazardous waste that had been characterized by its customers and that the waste was generated by the use of solvents containing F005. [Complainant's exhibit 22, page 1].

GDC admits that it accepted the waste from ACS, but claims that the ACS wastes received at its facility were not the listed F005 waste, but the hazardous-for-characteristic-of-ignitability waste D001. [Testimony of James Tarpo, pages 545, et seq.]. GDC has not produced any chemical analysis of the waste to refute the F005 classification; rather, Mr. Tarpo testified that no one at ACS had even tested the waste to determine its classification and that he could not produce any data to verify (or challenge) the

waste code. [pages 555 and 560]. Mr. Tarpo based his testimony that the waste was not F005 on the fact that it was not "pure" F005, but a F005 (solvent) mixture. [page 546]. Mr. Tarpo testified that the wastes would now be subject to regulation because there is a mixture rule in effect, but that at the time of the alleged violations, there was no such rule [pages 556 and 557]. 40 C.F.R. § 261.3(a)(2)[3] contains the mixture rule. It was originally promulgated as a final rule on May 19, 1990, 45 Fed. Reg. 33,119, and became effective on November 19, 1980. § 261.3(a)(2)(ii) of the May 19, 1980 rule, in effect at the time of the alleged violations, provides that a mixture of a solid waste and a listed hazardous waste is a hazardous waste unless it has been excluded from regulation by a "de-listing" rule. Mr. Tarpo testified that he was not aware of any such de-listing rule regarding the ACS waste [page 560], and GDC has produced no evidence of such a rule.

In sum, Mr. Tarpo admitted that the ACS waste did contain F005. He falsely assumed that the mixture rule, which, he acknowledged, renders the ACS waste RCRA-regulated, was not in effect at the time of disposal at GDC. Since, however, the mixture rule was in effect at the time of such disposal, the only basis for Mr. Tarpo's testimony that the ACS waste is not RCRA-regulated is groundless.

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[3] The federal regulations are relevant to the conditions and violations occurring at the facility prior to August 18, 1982, the date on which the State of Indiana Phase I regulations began to operate in lieu of the federal regulations.

GDC also asserts that it mixed the ACS waste with sand at the facility and thus rendered it non-hazardous [GDC answer, page 4; Testimony of Larry Hagen, page 699]. This practice is irrelevant for several reasons: 1) it was not in practice at the time of the alleged violations [Complainant's exhibit 3, page 2]; 2) according to the mixture rule in effect at the time, the only way to render a mixture of a listed waste and a solid waste non-hazardous was through a formal de-listing procedure and rule-making; 3) such mixture occurred after the waste was illegally received at the facility; 4) mixing the waste with sand was intended to reduce the waste's ignitability [GDC answer, page 4], but F005 is also designated hazardous for toxicity [40 C.F.R. § 261.31]; and, 5) it is just as illegal to treat and dispose of D001 without interim status or a permit as it is to do so for F005.

Thus, GDC has not successfully rebutted Region V's prima facie case that GDC accepted F005 waste from ACS.

D008. Mr. Cooper testified that, pursuant to a RCRA § 3007 information request from Region V, U.S.S. Lead Refinery, Inc. ("U.S.S. Lead") submitted a response containing manifests which document the shipment of EPA Hazardous Waste No. D008 from U.S.S. Lead to the GDC facility [Hearing transcript, pages 290 et seq.]. The notarized U.S.S. Lead response contains a statement by a U.S.S. Lead representative that all statements contained therein are true and authentic to the best of his knowledge. Pursuant to

40 C.F.R. § 261.24(b), EPA Hazardous Waste No. D008 consists of wastes deemed hazardous because of their lead content. The U.S.S. Lead manifests were accepted into evidence as Complainant's Exhibit 23 [Hearing transcript, page 335] and document the shipment of approximately 762,000 gallons of calcium sulfate waste, 880 cubic yards of rubber battery chips (broken battery casings) and 220 cubic yards of reverb slag to the GDC facility between November 20, 1980 and January 1983. Mr. Warner testified that, in the course of his duties, he had inspected the U.S.S. Lead facility which shipped the wastes to GDC and that, based upon his review of records at the U.S.S. Lead facility and of analytical results from sampling conducted by U.S. EPA, the calcium sulfate waste and battery chips sent to the GDC facility were hazardous because of their lead content. [Hearing transcript, pages 75 et seq.]. Of the 189 shipping manifests for calcium sulfate waste, 168 specifically identify that waste as "Hazardous Waste Solid - Lead -D008" or "Hazardous Waste Solid - Lead". 42 of the 45 shipping manifests for the battery chips and casings identify that waste as "Hazardous Waste Solid - Lead". All the shipping manifests for reverb slag identify the waste as "Hazardous Waste Solid - Lead".

GDC admits that it accepted wastes from U.S.S. Lead, but claims that the wastes arrived at its facility without manifests and that the wastes were not hazardous. [GDC answer, p. 5; Testimony of Larry Hagen, pages 760 et seq.]. GDC offered no evidence to support these claims. Copies of the manifests

previously accepted into evidence as Complainant's Exhibit No. 23 but now including signatures of GDC representatives acknowledging receipt of the wastes were admitted into evidence on December 18, 1990 as Complainant's Exhibit No. 33. [Hearing transcript, page 935].

K087. Mr. Cooper testified that, in response to an information request by Region V under Section 3007 of RCRA, the LTV Steel Company submitted a response documenting the shipment of approximately 273,000 gallons of EPA Hazardous Waste No. K087 (decanter tank tar sludges from coking operations) from the Jones and Laughlin Steel Corporation ("J&L"), an LTV Company, to the GDC facility between November 1980 and March 1982. [Hearing transcript, pages 256 et seq.]. Each of the J&L Part A manifests documenting shipment of K087 to the GDC facility includes a certification by a J&L representative that the manifested materials are properly classified according to applicable U.S. EPA regulations and identifies the GDC facility as the treatment, storage or disposal facility to receive the waste. The J&L response and manifests were accepted into evidence as Complainant's Exhibit No. 20 [Hearing transcript, page 264].

GDC basically denied having accepted any K087 waste from J&L. [Testimony of Larry Hagen, pages 696 to 698 and page 763]. On rebuttal, Region V introduced certified copies of the same Part A manifests admitted into evidence as Complainant's Exhibit No. 20, but these copies also included the corresponding Part B

manifests which contain the signature and certification of a GDC representative as having received the waste at the GDC facility. The new, complete copies of the J&L manifests (including both Parts A, signed only by the generator, and Parts B, signed by the transporter and disposal facility) were received into evidence as Complainant's Exhibit No. 33. [Hearing transcript, page 935]. GDC did not contest the certification on each manifest by the transporter that the shipment had been delivered to the GDC facility and had not been tampered with. GDC's only challenge to the validity of the manifests was the introduction into evidence of the printed name of a GDC employee (Brian Boyd) whose printed name appears on some of the manifests. [Respondent's Exhibit No. 19]. Although GDC's intent was to show that Mr. Boyd's printing of his name does not correspond to the printing appearing on the manifests, in fact, the printing in the exhibit appears nearly identical to that on the manifests.

In sum, GDC admits having accepted the relevant wastes from ACS and U.S.S. Lead and has failed to counter Region V's evidence that such wastes are EPA Hazardous Waste Nos. F005 and D008. Similarly, Region V has proved, and GDC has failed to disprove, that GDC also accepted EPA Hazardous Waste No. K087 from J&L. Having accepted these hazardous wastes for disposal renders GDC subject to RCRA regulation and liable for any violation thereof. [Section 3005 of RCRA, 42 U.S.C. § 6925].

B. The Gary Development Company Facility Does Not Have Interim Status to Operate Under RCRA and, Therefore, Must Close

Section 3005 of RCRA, 42 U.S.C. § 6925, requires any person owning or operating a hazardous waste management facility to have a RCRA permit or interim status. Facilities in existence prior to November 19, 1980 could legally operate as RCRA facilities after that date only if they obtained "interim status" by submitting a notification of hazardous waste activity to U.S. EPA by August 18, 1980 and a Part A RCRA permit application by November 19, 1980. Facilities not in existence prior to November 19, 1980 cannot legally operate as RCRA facilities without a complete, approved RCRA permit. Facilities that obtained interim status were required to submit Part B of their RCRA permit application by November 8, 1985. Facilities that were in existence prior to November 19, 1980, but did not attain interim status, were required to submit a closure plan to U.S. EPA or the authorized State by November 8, 1985.

The GDC facility began operation in 1972 [Testimony of Larry Hagen, page 614] and, therefore, must have attained interim status to operate as a RCRA facility after November 19, 1980. Mr. Cooper has testified that, based upon his review of Region V records, GDC never submitted a notification of hazardous waste activity. [Hearing transcript, page 177]. A June 10, 1982 letter from Region V State Implementation Officer Richard Shandross to the Indian State Board of Health [Complainant's Exhibit No. 28, admitted into evidence at page 180] also

indicates that GDC never submitted a hazardous waste notification form to U.S. EPA and, accordingly, did not obtain interim status. GDC neither confirms nor denies that it submitted the required notification and has offered no evidence in this regard.

Region V has established by the preponderance of the evidence that GDC was required to obtain interim status to operate as a RCRA facility and that GDC failed to obtain such status. Therefore, GDC must submit a closure plan to IDEM for approval and implement the plan as approved.

C. GDC Did Not Submit a Part B Permit Application

Section 3005(e)(2) of RCRA, 42 U.S.C. § 6925(e)(2) requires owners and operators of facilities in existence prior to November 19, 1980 to submit RCRA permit Part B applications by November 8, 1985. By its own admission, GDC has not submitted a Part B application to Region V or IDEM. [GDC answer, page 5].

D. GDC Did Not Comply With Applicable Ground-water Monitoring Requirements

Mr. Cooper testified that GDC did not comply with applicable ground-water monitoring requirements contained in 320 IAC 4.1-20. [Hearing transcript, pages 197 et seq.] He relied in part on a report prepared by a contractor on behalf of U.S. EPA. That report, admitted into evidence as Complainant's Exhibit No. 4 [Hearing transcript, page 212], documents all the ground-water

monitoring violations enumerated in Paragraph 13 of the Complaint. GDC has not refuted the substance of the report and does not assert that its system meets RCRA requirements. GDC claims that it is not subject to RCRA regulation and that it has the only ground-water monitoring system necessary for a non-RCRA landfill already in place. As set forth above, Region V has proved that GDC is subject to RCRA requirements and the contractor report clearly indicates that the GDC monitoring system does not comply with those requirements. [Complainant's Exhibit No. 4, page 3 and Appendix A-1; Testimony of Mr. Cooper, page 214]. Also, GDC's own ground-water monitoring expert readily concedes that the GDC ground-water monitoring system would not comply with RCRA requirements, as the GDC system was designed to meet sanitary landfill requirements, not hazardous waste landfill requirements. [Testimony of Dr. Terry West, pages 846 et seq.].

E. GDC Violated Specific Regulatory Requirements for RCRA Land Disposal Facilities

GDC has not contested the substance of the other RCRA regulatory violations alleged in the Complaint, other than to assert that it is not subject to the requirements because it is not a RCRA-regulated facility. As explained above, Region V has proved that GDC is a RCRA-regulated facility. Region V proved that GDC committed the other violations alleged in the Complaint

through the testimony of Ted Warner, who inspected the facility and observed the operational violations, and Jonathan Cooper, who reviewed Region V and IDEM records to determine compliance with financial assurance requirements, and with evidence admitted as Complainant's Exhibit Nos. 9 (ISBH Inspection Report of June 17, 1985) and 11 (ISBH Memorandum of July 29, 1985 Regarding June 17, 1985 Inspection). These violations are:

- Failure to maintain general waste analyses on file for wastes received, in violation of 320 IAC 4.1-16-4(a) and (b)
- Failure to post "Danger" signs, in violation of 320 IAC 4.1-16-5(c)
- Failure to conduct inspections of emergency equipment and security devices and to maintain inspection logs, in violation of 320 IAC 4.1-16(b) and (d)
- Failure to maintain required internal communication systems and functional emergency equipment, in violation of 320 IAC 4.1 17-3(a) through (d)
- Failure to maintain a contingency plan on file, in violation of 320 IAC 4.1-18-2
- Failure to follow proper manifesting procedures, in violation of 320 IAC 4.1-19-2(a)
- Failure to maintain operating records indicating description, date and quantity of waste received or disposal locations within facility, in violation of 320 IAC 4.1-19-4(b)(1) and (2)
- Failure to file unmanifested waste correction report, in violation of 420 IAC 4.1-19-7, and
- Failure to maintain financial assurance for closure and post-closure procedures or liability coverage for sudden and non-sudden accidental occurrences, in violation of 420 IAC 4.1-22-5 through 24.

Thus through the testimony of Mr. Warner and Mr. Cooper and the introduction of documentary evidence, Region V has proved the violations alleged in the Complaint for which relief is sought. GDC has been unable to offer any significant evidence to rebut the violations, but has only repeatedly (and erroneously) asserted that it is not a RCRA-regulated hazardous waste landfill.

III. THE PENALTIES ASSESSED BY REGION V IN THE COMPLAINT AND COMPLIANCE ORDER SHOULD BE UPHELD

Mr. Cooper testified that he calculated the $117,000 penalty assessed in the Complaint and Compliance Order based upon the May 1984 Final RCRA Civil Penalty Policy. [Hearing Transcript, pages 358 et seq.]. He explained how, in keeping with the policy, he evaluated each violation for which Region V assessed a penalty according to 1) its potential for harm to the regulatory program and the environment, and 2) its extent of deviation from the requirement. This two-pronged analysis enabled him to place each violation into a category within the policy's penalty matrix, which prescribes a range of penalty appropriate to each category. Mr. Cooper also testified that he developed a penalty calculation worksheet justifying his calculations in light of the RCRA Civil Penalty Policy for each violation. These worksheets were admitted into evidence as Complainant's Exhibit No. 29. [Hearing Transcript, page 361]. Together, these worksheets document the appropriateness of the total $117,000 penalty.

GDC's only substantive challenge to the penalty calculation, other than its false contention that it is not subject to RCRA-regulation, is that the penalty should be reduced because Region V has withdrawn its allegations concerning F006. [Hearing Transcript, pages 479, et seq.]. Mr. Cooper testified [Hearing Transcript, pages 889, et seq.], and the penalty calculation worksheets document, that neither the number of wastes nor the quantity of wastes affected the calculation of penalties for any violation. According to Mr. Cooper, he based his penalty calculations on the violations' harm to the RCRA program and the type and volume of waste had no effect on his analysis of that harm. [p. 891].

Therefore, withdrawal of Region V's allegations concerning F006 has no bearing on the assessment of the penalty in this case. Since Region V has proved that the $117,000 penalty assessed is consistent with the May 1984 Final RCRA Civil Penalty Policy, that penalty should be upheld by this Court.

IV. CONCLUSION

As set forth above, Region V has proved that GDC committed the violations alleged in the Complaint through the testimony of its witnesses and documentary evidence. GDC's only defense, i.e., that it did not accept hazardous waste at the facility and therefore is not subject to regulation under RCRA, has been proven false. For these reasons, the Court should grant the

relief requested in Complaint and Compliance Order by ordering GDC, in strict compliance with all RCRA requirements and the requirements set forth in the Complaint and Compliance Order, to:

1. Prepare and submit a closure plan and post-closure plan to IDEM for approval;

2. Submit to Region V and to IDEM for approval a plan and implementation schedule for a ground-water quality assessment program;

3. Implement the closure and post-closure plans and the ground-water quality assessment program as approved;

4. Submit a written report containing the results of the ground-water assessment program to Region V and IDEM;

5. Post "Danger" signs at the facility;

6. Cease accepting hazardous waste for disposal; and

7. Pay a civil penalty of $117,000 to the United States Treasury.

Respectfully submitted,

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